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No. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT, *et al.*,
Petitioners,

v.

WINNIE TEAL, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MAXIMILIAN W. KEMPNER
RICHARD C. DINKELSPIEL
Co-Chairmen

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN *
BEATRICE ROSENBERG

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th Street, N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In a Title VII suit by black employees who were absolutely barred by their failure to pass a written examination from being considered for promotion to positions they had temporarily filled, did the district court, which found the examination to be prima facie discriminatory, err in refusing to consider the validity of the test because a number of other black employees were ultimately selected for the positions at issue?

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has, over the past eighteen years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor. It has participated in a number of cases seeking, under Title VII of the Civil Rights Act of 1964,

to redress employment discrimination in the public and private sectors. The impact of paper and pencil tests upon minority opportunities for employment has been of considerable concern to the Committee, particularly in the recent case of *Luevano v. Campbell*, Civ. Action No. 79-0231 (D.D.C.), involving the validity of the so-called PACE test for professional employment in the federal service. Since the "bottom line" theory at issue in this case has general implications for both public and private employment opportunities, the Committee would like to present its views to the Court.

Written consents of both parties to the submission of this brief are being filed with the Clerk in accordance with Rule 36.1 of the Rules of this Court.

STATEMENT

The facts essential to the determination of the issue before this Court are not in dispute and appear for the most part in the opinion of the Court of Appeals.

The four respondents are black employees of the Department of Income Maintenance of the State of Connecticut who were promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for periods in excess of two years. To attain permanent status in such positions, they had to pass a written examination. Only if they passed that examination would they become part of an eligibility pool from which permanent appointments would be made on the basis of various criteria, including past performance, recommendations of supervisors, interest in the work, seniority, etc.

Respondents failed the written test and thus became ineligible for further consideration for promotion to positions as supervisors. Of the 329 persons who took the test, 48 were identified as black and 259 as white.

With a passing grade set at 65,[1] 54.17% (26 in number) of the black candidates and 79.53% (206 in number) of the white candidates passed the examination. The passing rate for black candidates was thus 68% of the passing rate for whites.

The results of the examination were announced in March 1979. In April, respondents instituted this action against the State of Connecticut and the individual defendants, alleging *inter alia* a violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) by the requirement, as an absolute condition for consideration for promotion, of the passing of a written test which excluded blacks in disproportionate numbers and which was not job related. While the case was pending, the State made appointments to the permanent supervisory positions. Forty-six persons, 11 blacks and 35 whites, were appointed. Thus, 23% of the blacks and 13.5% of the whites who began the selection process were promoted.

The district court, relying on the opinion of Judge Newman in *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256, 1260 (D. Conn. 1979), dismissed the Title VII claim. It adopted the reasoning of the New Haven decision that, even though the passing rates on the examination showed a *prima facie* case of adverse impact upon minorities, the "ultimate results of the entire hiring process, however, show that no *prima facie* case of adverse impact is established." It therefore found it unnecessary to rule upon the state's claim that the examination was job-related. (R. 19-20.)

The court of appeals reversed. It held that the district court erred in ruling that the results of the written examination alone were insufficient to support a *prima*

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[1] The passing grade was set at 65, although the mean score on the examination was 70.4 because black candidates had a mean score 6.7 percentage points lower than the white candidates.

facie case of disparate impact in violation of Title VII. It drew a distinction between the situation where all the candidates participate in the entire selection process and the overall results reveal no significant disparity; and the situation, such as that in the instant case, where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process." To deny the applicability of Title VII in the latter situation, the court said, would be to interpret Title VII to protect faceless groups rather than individuals. It noted:

> Where an employment practice forecloses a disproportionate number of persons in a protected group from a job, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees.

Accordingly, the court of appeals remanded the cause to the district court for a determination of the job-relatedness of the examination in question.

SUMMARY OF ARGUMENT

I

The district court's decision dismissing the cause of action and the court of appeals' opinion reversing it both proceed on the assumption that, if the test at issue were considered by itself, it would be deemed *prima facie* discriminatory under the principles announced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the 1978 Uniform Guidelines on Employee Selection Procedures. The only reason that the district court deemed it unnecessary to pass on the job-relatedness of the test was that, in the final selection, the State of Connecticut appointed a number of blacks, other than these respondents, to the vacant supervisory positions. Thus, the essence of the position of petitioners, which the government supports, is that an employer may discriminate against one group of blacks if it favors another group.

The court of appeals properly ruled that discrimination against these respondents on the basis of race cannot be justified because other members of their race received favorable treatment. If an employer decided that it would employ only light skinned blacks, it would be discriminating against dark skinned blacks on the basis of their race, no matter how many light skinned blacks it employed. The test here operated in the same fashion. It excluded from consideration for promotion on the basis of race a particular group of blacks who, in the present posture of the case, must be regarded as lacking only non-job-related characteristics. This is discrimination on the basis of race, no matter how many other blacks were ultimately appointed.

The fact that the employer achieved a racially balanced work force in its ultimate hiring policy does not excuse racial discrimination against individuals who were excluded from consideration by the discriminatory examination. *See Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978).

It is the barrier effect of the test at issue which lies at the heart of the court of appeals' decision. If the test here were only one part of the selection process which did not bar respondents from further consideration, their experience, supervisory recommendations, interest in the job, and seniority may well have overcome the effect of the test. In that situation, the "bottom line" theory makes sense. It is not reasonable to try to determine the impact of a test or any other intermediate step in a multi-faceted process if the overall result shows no discriminatory impact. There is, however, a significant difference between the need to consider the fairness of one of many factors entering into a total result and the need to consider the fairness of a distinct criterion which, if not satisfied, totally excludes further consideration.

The government's policy of not bringing enforcement actions if the overall effect of a selection process is not exclusionary is admittedly an exercise of prosecutorial discretion. Whether the exercise of that discretion is wise or unwise, it cannot determine the individual rights of these respondents.

The fallacy of petitioners' position is that it interprets Title VII with respect to disparate impact cases as protecting group, but not individual rights. Title VII's primary focus, however, is on the individual. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). Respondents, as individuals, have the right not to have their opportunity for promotion cut off by a racially biased, non-job-related test.

II

The contention that the test at issue is not subject to attack because it falls within the protection of Section 703(h) of Title VII as part of a bona fide merit system is not properly before this Court, since the issue was not decided below and was not raised in the petition for a writ of certiorari. *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 62 n.4 (1959).

The contention is, in any event, without merit. It was specifically rejected by the Second Circuit in *Association against Discrimination v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *petitions for cert. filed*, 50 U.S.L.W. 3134 (Aug. 25, 26, 1981). Other courts of appeals have assumed that racially biased non-job-related civil service examinations are subject to attack under Title VII. The legislative history of the 1972 amendments, which brought state and local governments under Title VII, shows that Congress, which was well aware of the *Griggs* standard, intended to have it apply to state and local examinations.

ARGUMENT

I

THE RIGHTS OF THE INDIVIDUAL RESPONDENTS UNDER TITLE VII WERE VIOLATED BY A TEST WHICH DISCRIMINATORILY EXCLUDED THEM FROM CONSIDERATION FOR PROMOTION ON THE BASIS OF RACE.

A. The "Bottom Line" Interpretation Urged by Petitioners and the Government Fails to Give Effect to Congress' Purpose in Title VII of Protecting All Individuals from Racial Discrimination by Employers to Whom the Act Applies.

The essence of the "bottom line" theory, as interpreted by the district court and supported by petitioners and the government, is that an employer may exclude one group of blacks on the basis of race if it favors another group of blacks for the same position. Both the district court and the court of appeals, in their decisions, recognized that if the test at issue was the sole determinant for promotion, the disparity in the rate of success of black and white candidates established a *prima facie* case of race discrimination under the principles enunciated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Those principles have been given specificity by the government's 1978 Uniform Guidelines on Employee Selection Procedures, which provide that a selection rate for any race which is less than 80% of the group with the highest rate will generally be regarded as evidence of adverse impact. 28 C.F.R. § 50.14 (1978).[2]

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[2] Petitioners suggest that, contrary to the above cases and the guidelines, the pass-fail ratio should not be enough to establish a *prima facie* case of discrimination without a showing of "invidiousness." (Pet. Br. 16-18.) As we discuss *infra* with respect to petitioners' contention that the tests are protected as part of a merit system, no such issue is properly before the Court in this case.

If the State of Connecticut had, for any reason, failed to fill the positions at issue before the case was tried, there is no doubt that the district court would have found it necessary to decide the job-relatedness of the test under attack. The only reason the district court found it unnecessary to determine job-relatedness was that, in the overall selection, a number of blacks who had passed the test were appointed as supervisors.[3] Thus, the discriminatory effect (which must be presumed at this juncture) of the test on these respondents is sought to be justified on the basis of the treatment of other blacks.[4]

No such issue was decided by the courts below and no such issue was raised in the petition for a writ of certiorari.

In any event, petitioners' contention is without support. While *Griggs v. Duke Power, supra,* arose in a state which historically had operated segregated school systems, no court of which we are aware has held that fact to be controlling. Racially biased tests have not, unfortunately, been confined to any part of the country. Even the federal government has failed adequately to consider the factor of racial bias in some of its tests. *See Douglas v. Hampton,* 512 F.2d 976 (D.C. Cir. 1975). For a discussion of the historical mistakes in examinations and the need for care in the testing process, *see* S. Gould, THE MISMEASURE OF MAN (1981).

As we discuss *infra,* Congress, when it amended Title VII to cover state and local governments, intended such entities to be subject to the same standards as private employers.

Petitioners' arguments as to the Tower amendment were discussed and rejected by this Court in *Griggs, supra.* That decision also established that a showing of intent to discriminate is not necessary to prove a violation of Title VII based on disparate impact.

[3] We do not mean to suggest that the state acted improperly in filling the positions or that it did so with intent to avoid a determination of the validity of the test. We merely emphasize that adjudication of the test on its own merits was deemed unnecessary because of later occurring events.

[4] The state suggests that there is no evidence that the appointment of blacks who passed the test to fill the vacant positions was the result of affirmative action. This is irrelevant. Whatever the reason for the high percentage of blacks appointed, the fact is that the adverse impact of the test on respondent blacks is sought to be justified by the appointment of other blacks.

The court of appeals properly ruled that discrimination against some individuals on the basis of their race cannot be justified because other members of their group received favorable treatment. If an employer decided that he would employ only light-skinned blacks, he would be discriminating against dark-skinned blacks because of their race, no matter how many light-skinned blacks he employed. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), where the Court recognized that a rule applying only to married women with children was discrimination on the basis of sex even though female employees without children were not affected thereby. The test at issue here, assuming as we must for present purposes that it was racially biased, operated in much the same way. It excluded from consideration for promotion on the basis of race a particular group of blacks who did not possess non-job-related characteristics. This is discrimination on the basis of race, no matter how many blacks were ultimately appointed. As this Court said in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978), "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." The Court added (438 U.S. at p. 579):

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.

While *Furnco* referred to existing racial balance in the work force, the principle it enunciated applies here. The fact that the employer achieves a racially balanced work force in its ultimate hiring policy does not excuse racial discrimination against individuals who were excluded by the discriminatory examination.

The district court, and the *Brown* opinion on which it relied (see *supra*, p. 3), drew a distinction between intentional discrimination against particular individuals in the selection process and the situation here, where the

exclusion of particular individuals comes from the disparate impact of a selection device, such as a test. They admit that, under *Furnco, supra*, intentional discrimination against particular black individuals cannot be justified by the fact that a sufficient number of other blacks are ultimately selected. A barrier, however, remains a barrier, whether or not it was intended as such. A person kept out by a closed door is as much excluded by a door blown shut as by one deliberately closed. This Court established in *Griggs v. Duke Power Co., supra*, that the adverse impact of a barrier, such as a racially biased, non-job-related test, constituted a violation of Title VII, whether or not the employer who used it intended to discriminate. Since that is so, an individual member of a minority race has a right, under Title VII, not to be excluded from promotion by a racially discriminatory, non-job-related test, whatever the intentions of the employer who gives the test. Title VII confers rights on individuals, not only on groups. A barrier to individual advancement, if it is based on race, cannot be justified because some other members of the race have managed to leap that barrier.

If, in a litigated case, a test was adjudicated to be racially biased and non-job related under the standard of *Griggs*, a court, in fashioning relief, would not make the plaintiffs whole by requiring only that the employer hire a number of blacks who had managed to pass the racially biased test. How then can the appointment of blacks who passed the test be a proper consideration in the determination of the validity of the test?

B. The Decision of the Court of Appeals Below Does Not Require Separate Validation of Individual Test Items or Factors Applied to All Applicants in a Single-Step Selection Process.

It is the barrier effect of the test on respondents which lies at the heart of the decision of the court of appeals. The "bottom line" theory, which looks to the overall result of a selection process in determining ad-

verse impact, makes sense where no one aspect of the process is given controlling weight. As the court of appeals pointed out, where "all of the candidates participate in the entire selection process and the overall results reveal no significant disparity of impact, scrutiny of individual questions or sub-tests would conflict with the dictates of common sense." The situation, it noted, is different "where an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process."

Thus, if the test here were only one part of the selection process which did not bar respondents from further consideration, the district court would have been justified in declining to determine the impact of the test alone. If experience, attitude, seniority, etc. were weighed with the test, it could not be said that the test alone was the barrier to the promotion of respondents. It might very well be that other factors would have overcome whatever deficiencies were shown by the test. It is manifestly different, with respect to the individuals involved, that the test here was an absolute bar to their further consideration for the position, so that none of the other factors in their favor could be considered. If five persons had to conduct interviews to rate a candidate, even if one had an unconscious bias against a particular type of minority, a total result showing no significant disparity would justify the conclusion that the various interviewers counterbalanced each other. The situation would be entirely different if the one interviewer determined whether candidates would be further considered and there was a significant disparity in the number of blacks to be further considered. If he were shown to be biased against a particular kind of minority because of some non-job-related characteristic, the selection process would manifestly be tainted no matter how many other minorities of the kind he approved of were

ultimately selected. There is, in short, a big difference between absolute exclusion and consideration of one of many factors. For this reason, it does not follow, as petitioners would have it (Pet. Br. 27), that the opinion below would require each question on a test or each step in a many-faceted selection process to be subject to analysis for racial impact. It is only where one distinct step in the process is determinative of the right to further consideration that such a step could be said to be a barrier to employment opportunity. If it is such a barrier, and the barrier is discriminatory against individuals on the basis of their race, then, as the court of appeals held, Title VII grants such individuals the right to have that barrier removed.

The government suggests that, even if one step, such as a test, is not an absolute barrier to further consideration, it may in some instances operate as such because it may be given enough weight to turn the balance against an individual. It is true that perfect justice may not always be achieved in a multi-faceted process because undue weight may be given to some factor. But the fact that perfect justice is not always possible is hardly a basis for allowing gross injustice to go unchallenged. That it may be realistically impossible to evaluate each component of a multi-faceted process hardly justifies the failure to judge the fairness of a particular, defined step in the process which determines the right of particular individuals to be further considered.

The fallacy of petitioners' position is that they interpret Title VII with respect to disparate impact cases as protecting group rights, but not as conferring rights upon particular individuals. As the court of appeals stated, their position would interpret Title VII as protecting "faceless groups," not persons. But Title VII does confer rights on individuals. It gives each individual

injured by discriminatory action the right to file charges and to bring an action to remedy the injury which such individual personally suffered as the result of the discriminatory action. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978). As the Court there said, the "statute's focus on the individual is unambiguous." It is true that, in proving a disparate impact case, it is necessary to look at group statistics to determine whether a particular requirement unfairly acts as a barrier to a protected class. But the fact that group disparity is a means of proving that a barrier exists does not require that only the group, and not the individual kept out by that barrier, has the right to seek removal of the barrier. Rather, as the *Manhart* case holds, individuals suffering from discriminatory treatment have the right to seek redress for the injury so sustained.

C. The Uniform Guidelines Adopt A "Bottom Line" Theory to Guide the Exercise of Prosecutorial Discretion But They Do Not Constitute An Interpretation of the Substantive Meaning Of Title VII to be Followed by the Courts.

The 1978 Uniform Guidelines on Employee Selection Procedures, *supra*, state that, as a matter of prosecutorial discretion, the federal enforcement agencies will not, if the overall effect of a selection process is not exclusionary, examine the individual components of that process for adverse impact. That policy does not determine this case. The policy, which is admittedly an exercise of prosecutorial discretion, does not fix the rights of individuals. Prosecutorial discretion does not define or determine rights. If the United States Attorney for the Southern District of New York decided that his office should not prosecute cases of cars stolen in New Jersey and transported to New York, that might very well be a sound exercise of discretion in making effective use of limited resources. It would not make the interstate

transportation of the stolen vehicle legal or prevent the individual owner, if he could identify the thief, from seeking to recover damages sustained as the result of the theft. So here, whether the government's policy is wise or unwise, the claims of the individual respondents cannot be affected thereby.

The opinion of Judge Newman in the *Brown* case, on which the district court relied, urged the adoption of the "bottom line" theory as a means of encouraging affirmative action. But, as petitioners themselves suggest in stating that there is no proof that the appointments here were influenced by affirmative action principles, this case does not involve any issues as to affirmative action. Presumably the government believes that its "bottom line" approach will encourage employers to take affirmative action to avoid the necessity of validating such tests as they may wish to use. Whether that policy is wise or unwise is not a matter which is material to the rights of these respondents. The issue of when it is appropriate for an employer to undertake affirmative action to remedy past discrimination against a class or to seek to achieve an integrated work force is not presented by this case. Nor is this an appropriate vehicle to decide whether it is better for minorities as a whole to be subject to fair employment procedures rather than to the continuation of an unfair procedure by the adoption of compensating measures. What is at issue here is the right of particular individuals not to have their opportunity for promotion cut off by a racially biased, non-job-related test. The court of appeals properly held that, if the test at issue here is such a test, respondents have personally been injured thereby regardless of how many blacks were appointed to the position. Respondents thus have a right, under Title VII, to have a court determine whether the test is valid or whether it is an unfair, racially biased barrier to their consideration for promotion.

II

A RACIALLY DISCRIMINATORY, NON-JOB-RELATED PROMOTION TEST IS NOT A BONA FIDE MERIT SYSTEM WITHIN THE PURVIEW OF SECTION 703(h) OF TITLE VII

Petitioners contend (Pet. Br. 28-37) that, whether or not the promotion test at issue has a disparate impact on blacks within the principles of *Griggs v. Duke Power*, and the Uniform Guidelines on Employee Selection Procedures (see *supra* p. 7), the test is not subject to attack because it falls within the protection of Section 703(h) of Title VII. That section states that it is not an unlawful employment practice for an employer to apply different standards pursuant to a bona fide merit system, provided such differences are not the result of an intention to discriminate. The argument based on Section 703(h) (Pet. Br. 28-37) is not properly before this Court. The contention was not, so far as we are able to ascertain, advanced in the district court or the court of appeals. It certainly was not decided by either court. It was not raised as a question presented or argued in the petition for a writ of certiorari. This Court does not consider issues not decided below and not raised in the petition for a writ of certiorari. *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 62, n.4 (1959).

The contention that Section 703(h) protects the test at issue is, in any event, without merit. The Court of Appeals for the Second Circuit has expressly rejected a similar contention, pointing out that there are two reasons why the merit system exemption of Section 703(h) does not apply to biased, non-job-related civil service examinations. *Association against Discrimination v. City of Bridgeport*, *supra* p. 6. The court noted that, where an examination serves to discriminate against minorities, it is being used to discriminate. More fundamentally, the court held (247 F.2d at p. 273), "it would

defy reason to characterize as a 'bona fide merit system' a test that does not measure the fitness of those who take it for the positions to be filled according to its results."

While other circuit courts of appeals have not dealt specifically with the merit system contention which petitioners urge here, they have upheld attacks on civil service examinations as discriminatory under Title VII. *Firefighters Institute v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *see also id.*, 616 F.2d 350 (8th Cir. 1980), *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir.), *cert. denied*, 446 U.S. 917 (1979); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *United States v. City of Chicago*, 573 F.2d 916 (7th Cir. 1978).

In ruling that the *Griggs* standard (which does not require a showing of intent to establish a violation of Title VII based on disparate impact) applies in actions against states and municipalities, the Ninth Circuit in *Blake*, *supra*, and the Seventh Circuit in *City of Chicago*, *supra*, relied on the legislative history of the 1972 amendments to Title VII which brought state and local governments within the coverage of Title VII. That legislative history shows that Congress enacted the 1972 amendments after taking notice that "wide spread discrimination against minorities exists in State and local government employment." H.R. Rep. 92-238, 92d Cong., 1st Sess., p. 17 (1971). It referred to a study by the U.S. Commission on Civil Rights which had found discrimination in state and local governments, north and south, perpetuated by various means, including "invalid selection techniques" (*ibid.*). As this Court said in *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977), "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 17 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 10 (1971). Thus Congress, which

was well aware of the *Griggs* standard with respect to tests, intended those standards to apply to state and local governments. It manifestly did not deem such tests to fall within the exemption of the 1965 Act for bona fide merit systems.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MAXIMILIAN W. KEMPNER
RICHARD C. DINKELSPIEL
Co-Chairmen

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN *
BEATRICE ROSENBERG

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th Street, N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae

* Counsel of Record